Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF OF AMERICAN MUTUAL REINSURANCE COMPANY, RESPONDENT, IN SUPPORT OF PETITIONER.

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ARGUMENT.

I.

Reversal of the Order of the Court of Appeals for the Seventh Circuit Issuing the Writ of Mandamus Is Required to Prevent Wasteful, Duplicative Litigation Instituted by Parties Seeking to Indefinitely Delay the Adjudication of Controversies on the Merits.

The record before the Court of Appeals includes the Opinion of the Illinois Appellate Court in the parallel state court ac-

tion instituted by American Mutual Reinsurance Company ("Amreco") against Calvert Fire Insurance Company ("Calvert"). It is impossible to have a complete understanding of this case, or of the ramifications of the order of the Court of Appeals, without some knowledge of the state court action.

This litigation was commenced in July of 1974 when Amreco filed a straightforward contract action against Calvert in the Circuit Court of Cook County, Illinois. Calvert could have removed the case to the United States District Court on the basis of diversity jurisdiction, but did not do so. Amreco in its Complaint alleged that Calvert breached its reinsurance contract to reinsure Amreco. Amreco had a similar contract with 99 other reinsurers. The reinsurance contract in question covered the year 1974, a year in which casualty and fire losses were unusually high.

Calvert was the only one of the 100 reinsurers who had similar contracts with Amreco which attempted to avoid its liability under the reinsurance contract. Calvert has alleged that Amreco made misrepresentations in order to induce Calvert to enter the contract.

Amreco is, and has been for almost four years, prepared to prove that Calvert attempted to rescind its agreement only after Calvert became aware of potential losses under the reinsurance agreement resulting from a disastrous wave of tornados which struck the South and Midwest in early April, 1974.[1]

Amreco has sought an adjudication of the case since its inception but has been subjected to a continuing barrage of dilatory and burdensome procedures. To avoid an adjudication of the basic issues, Calvert has:

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1. "Twisters Put Reinsurers in the Forefront", The National Underwriter, April 12, 1974, at 1, col. 4 ("The reinsurers are going to get murdered"). The telegram from G. E. Roberts, President of Calvert, demanding Amreco to "Terminate our multiline reinsurance agreement retroactive to January 1, 1974" was sent on April 19, 1974.

1. Moved to have Amreco's action dismissed on the ground that declaratory action was not an appropriate remedy for breach of contract.
2. Moved to have the order denying Calvert's Motion to Dismiss certified for an interlocutory appeal, which Motion was denied.
3. Moved to stay discovery in the state court action pending its Motion to Dismiss.
4. Attempted, a second time, to have Amreco's action dismissed or, in the alternative, transferred from the Law Division to the Equity Division.
5. Moved that the Court certify for an interlocutory appeal the question raised by Calvert's second Motion to Dismiss, which Motion to certify was denied.
6. Answered Amreco's Complaint alleging both as a defense and in support of a counterclaim for rescission and damages that Amreco was guilty of common law fraud. Calvert also alleged, as defenses and in support of its counterclaim violations of the Securities Acts premised on the proposition that Calvert's contract to reinsure Amreco constituted the sale of a "security" by Amreco to Calvert.
7. Instituted the instant action in the United States District Court six months after Calvert had been sued in the state court seeking a rescission of its reinsurance contract, or in the alternative, damages based on the foregoing alleged violations of the Securities Acts. The only difference in the allegations made by Calvert in the District Court from those made by Calvert in the Circuit Court of Cook County was the addition of an ancillary claim for money damages under Rule 10b-5.
8. Moved to stay the state court proceedings in the state trial court pending the outcome of the district court action. This motion was denied.

9. Having failed to have the state court actions stayed, sought a change of venue on the grounds that the trial court was prejudiced against Calvert. Calvert's motion, again, was denied.

10. Filed a petition for writ of mandamus in the Supreme Court of Illinois, after the state trial court had issued its decision striking Calvert's defenses and counterclaim based upon the Securities Acts, seeking a writ of mandamus to require the trial court judge to grant Calvert's motion for a change of venue. The motion to file the petition for the writ of mandamus was denied by the Illinois Supreme Court.

11. Sought an interlocutory appeal to the Appellate Court of Illinois, from the order of the trial court striking Calvert's alleged defenses and counterclaims based on federal and state securities laws. The appeal was granted, and the Illinois Appellate Court affirmed the decision of the trial court.

12. Moved for a rehearing in the Appellate Court of Illinois, which rehearing was denied.

13. Moved for a certificate of importance from the Appellate Court to the Illinois Supreme Court.

14. Before the Appellate Court ruled upon the Motion for a certificate of importance, Calvert filed a petition for writ of mandamus requiring the Appellate Court to rule on Calvert's motion for a certificate of importance.

15. Filed a petition for leave to appeal to the Illinois Supreme Court from the judgment of the Appellate Court, which petition was denied.

16. During the time period Calvert was undertaking the foregoing, Calvert filed a petition for writ of mandamus with the Court of Appeals for the Seventh Circuit which is the subject of this Court's consideration.

17. After the granting of the petition for writ of mandamus, Calvert opposed the motion of Amreco to stay the issuance and effect of the writ of mandamus pending the disposition of this case by this court.

Calvert's ingenuity in exploiting all procedural avenues permitted in the state and federal courts is self-evident when it is noted that Calvert has succeeded in bringing one aspect or another of this dispute before the Circuit Court of Cook County, the Appellate Court of Illinois for the First District, the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit and this court.

Almost four years have elapsed since this simple contract action was instituted in the Circuit Court of Cook County and resolution of the dispute is still not within sight.

Calvert has succeeded in these maneuvers by contending that the conventional reinsurance agreement entered into whereby Calvert was to reinsure Amreco constituted the sale of a "security" by Amreco to Calvert and by Calvert's invoking the jurisdiction of both the Illinois courts and the federal courts to adjudicate this claim.

Judge Will perceived this strategy at an early stage and issued an order staying proceedings in the United States District Court pending resolution of the issues raised by Calvert in the state court. Unfortunately, the order of the Seventh Circuit Court of Appeals issuing the writ of mandamus requiring Judge Will to immediately rule on the "security" issue has permitted Calvert to continue its dilatory practices and delay adjudication of this dispute on the merits.

If the order issuing the writ of mandamus is not reversed, Judge Will will be required to adjudicate the "security" issues. Judge Will has stated, as part of the record, that if required to

adjudicate this issue, he would adjudicate it against Calvert, even as the Illinois courts have done.[2]

The only result of the ruling mandated by the Court of Appeals would be an appeal by Calvert from the ruling of Judge Will to the Court of Appeals for the Seventh Circuit and, if the Court of Appeals affirms Judge Will, presumably a petition for a certiorari to this court will be filed.

It is difficult to conceive that such practices should be tolerated, much less condoned.

Absent all questions of *res judicata* and collateral estoppel resulting from the state court determination, there is no valid reason why Calvert, which has placed the federal securities issue before both the state courts and the United States District Court, should be the beneficiary of a writ of mandamus directing Judge Will to immediately adjudicate its "security" issue.

The failure of this Court to reverse the order of the Court of Appeals issuing the writ of mandamus will condone the activities of Calvert in continuing to shop for a forum which will favorably rule on its security issue and, at the very least, delay indefinitely a resolution of this dispute.

It is impossible to believe that this Court intended its decision in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976) to sanction conduct such as Calvert has engaged in. The Court of Appeals apparently did not appreciate the practical consequences of its issuance of the writ.

Moreover, the Court of Appeals issued the writ, predicated upon the assumption that Calvert might have a claim under Rule 10b-5 and the Securities Exchange Act of 1934 against Amreco for money damages which is the only "security" issue raised by Calvert which has not been presented to the Illinois courts. (The Illinois courts have decided that the transaction in

2. Transcript of Proceedings before the Hon. Hubert L. Will on June 18, 1975, at 3, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 102 (N. D. Ill. 1975).

question did not constitute the sale of a "security" under either the 1933 or 1934 acts).

The fallacy underlying the opinion of the Court of Appeals in this respect is that Calvert's claim for money damages is a claim which could never be granted. Calvert has paid nothing to Amreco under its contract of insurance. Money damages could accrue to Calvert only if it were held liable under the contract. If Calvert should prevail in either case it would be granted rescission, and no damages could be assessed. The money damage claim is totally superfluous to Calvert's claim and defenses as was recognized by Judge Will during oral argument.[3]

The history of this litigation demonstrates the ramifications of the Seventh Circuit's application of this Court's decision in *Colorado* to litigation of this type. It is difficult to believe that this Court intended such a reading of *Colorado River* or the Seventh Circuit intended to sanction such to conduct.

Amreco has already been subjected to endless, expensive, dilatory practices. To prevent such abuse in the future, District Court judges must be revested with the authority they formerly possessed to control their dockets. This Court can do so by reversing the decision below and reaffirming *Landis* v. *North American Co.*, 299 U. S. 248 (1936) as suggested by the Petitioner.

II.

Reversal of the Order Granting the Writ of Mandamus Will Rectify the Clearly Erroneous Interpretation Given by the Court of Appeals to the Colorado River Case.

The Court of Appeals for the Seventh Circuit apparently completely misapprehended the holding of this court in *Colorado River* in determining to issue the writ of mandamus requiring an

3. Transcript of Proceedings before the Hon. Hubert L. Will on May 9, 1975, at 50, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

immediate adjudication of the issues before the Honorable Hubert L. Will.

Ironically, *Colorado River*, should be read as supporting the action taken by Judge Will. In the *Colorado River* case this Court approved the dismissal of an action commenced in the United States District Court when the same issue was pending in the state court. The Seventh Circuit interpreted *Colorado River* as applying to stay procedures as well as dismissal and determined that only in "exceptional circumstances" should such a stay order be issued, not finding such circumstances in this case.

The *Colorado River* case does not support, much less demand the extraordinary action taken by the Court of Appeals. In *Colorado River*, the cause of action in the district court was dismissed and the aggrieved party was deprived of any remedy in the federal court. This court was understandably cautious in sanctioning such dismissal but did in fact affirm the action of the trial court.

The instant case does not involve a dismissal of a federal claim but merely a stay order. Calvert has not been deprived of a single federal remedy. The adjudication of Calvert's federal remedy has merely been postponed. Judge Will has only determined not to proceed with the ancillary Rule 10b-5 claim while the substantive issues of the federal securities laws were litigated at the instance of Calvert in the court of Illinois where Calvert had placed the subject in issue.

Nor does *Colorado River* support the issuance of the extraordinary writ of mandamus. *Colorado River* speaks to the discretion which federal judges do and should have in dealing with piecemeal litigation in multiple courts. 424 U. S. at 818-819. *Colorado River* grants discretion to district judges to dismiss in instances of multiple litigation. Certainly a district judge should also possess discretion in exercising the less drastic power to postpone an adjudication.

The interpretation given to *Colorado River* by the Court of Appeals is that every district court must grant an "immediate"

adjudication to a party claiming a federal right even while that same party has placed his federal right in issue in another court and has already had two adjudications of the issue.

Reversal of the order issuing the writ of mandamus in the instant case will cure the confusion resulting from the opinion of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is therefore respectfully submitted that the order of the Court of Appeals for the Seventh Circuit issuing the writ of mandamus be reversed.

Respectfully submitted,

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